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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion and protection of human rights and fundamental freedoms while countering terrorism

Note by the Secretary-General**

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, submitted in accordance with Assembly resolution 72/180 and Human Rights Council resolution 31/3.

* A/73/150.

** The present report was submitted after the deadline in order to reflect the most recent developments.

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Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Summary

The present report is the second annual report submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism since her appointment in August 2017. A brief introduction (sect. I) is followed by a description of the activities of the Special Rapporteur during the reporting period (sect. II). The report broadly addresses the effects of thematic Security Council resolutions concerning terrorism on the promotion and protection of human rights since the events of 11 September 2001. The Special Rapporteur reflects on the important regulatory and gap-filling role played by the Security Council in respect of peace and security (sect. III) in the field of counter-terrorism, including terrorist financing and cooperation between States. The Special Rapporteur addresses new regulatory elements in counter-terrorism regulation, as evidenced in the resolutions adopted by the Council since 11 September 2001, and their broad impact on State practice, implementation and sovereignty (sect. IV). The particular effects of the resolutions on human rights protections are outlined (sect. V), and the parallel effects on the promotion and protection of international humanitarian law are also briefly described (sect. VI). The report contains a number of concrete recommendations made by the Special Rapporteur to enable best practices on human rights and international humanitarian law compliance in the context of counter-terrorism regulation applicable to the adoption and implementation of Security Council resolutions Furthermore, the Special Rapporteur affirms the essential role of the Council in maintaining peace and security, as set out in the Charter of the United Nations and informed by the essential and profound commitment to human rights as the bedrock of international institutional practice contained therein. The Special Rapporteur also affirms the important complementary role of the General Assembly in the field of counter-terrorism and encourages the Assembly to use its capacities to the full to ensure that human rights remain an enforced and indispensable element in regulating the challenge of terrorism and addressing the conditions conducive to terrorism.

I. Introduction

1. The present report, the second report submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism since her appointment in August 2017, is submitted pursuant to General Assembly resolution 72/180 and Human Rights Council resolution 31/3. The report analyses the impact on the protection and promotion of human rights and, inter alia, international humanitarian law following the adoption of multiple resolutions regulating terrorism by the Security Council in the period after 11 September 2001.

2. A report on the work undertaken by the Special Rapporteur since her last report to the General Assembly (A/72/495) is provided below.

II. Activities of the Special Rapporteur

3. The Special Rapporteur has had a fruitful year advancing positive and sustained dialogue with States concerning the protection and promotion of human rights. The Special Rapporteur is pleased to have received invitations from Australia, Belgium, Bosnia and Herzegovina, France, Kazakhstan, Kenya, Mali, Tajikistan, Uganda and the United States of America to conduct country visits. Country reports have been issued in respect of Tunisia, Saudi Arabia and Sri Lanka, completing the mandate commitments of the previous Special Rapporteur, Ben Emmerson. Country visits were undertaken to Belgium and France in May 2018, and the Special Rapporteur notes the productive, collegial, and highly engaged character of those visits and the openness of both Governments to dialogue. Two additional country visits are pending, one to Qatar, in October 2018, and the other to Kazakhstan, in May 2019.

4. The Special Rapporteur presented her thematic report on the human rights challenge of states of emergency in the context of countering terrorism (A/HRC/37/52) to the Human Rights Council in March 2018. In that report, she urged States to ensure that any resort to the use of counter-terrorism regulation, including the declaration of emergencies, was commensurate with State obligations, specifically identifying the high cross-over between the use of counter-terrorism regulation and the resurgence of de facto states of emergency. States were: reminded of their obligations of proclamation, notification and derogation; encouraged to make better use of ordinary law to address legal challenges; reminded of the high rate of overlap between de facto and permanent states of emergency, with sustained and serious human rights violations; and urged to institute independent oversight of counter-terrorism legislation and administrative practice to ensure that counter-terrorism measures were not seriously detrimental to human rights obligations.

5. The Special Rapporteur, as one of 38 member entities of the Counter-Terrorism Implementation Task Force within the United Nations counter-terrorism architecture, has made working within the United Nations structure itself a high priority.[1] She is deeply committed to the "all of United Nations" approach to countering terrorism, with human rights as an essential pillar of that approach, as affirmed in the United Nations Global Counter-Terrorism Strategy.[2] The Special Rapporteur is an active participant in multiple thematic working groups of the Counter-Terrorism Implementation Task Force (including the working groups on victims of terrorism; a gender-sensitive approach to preventing and countering terrorism; promoting and protecting human rights and the rule of law while countering terrorism; foreign

[1] See www.un.org/counterterrorism/ctitf/en/structure.

[2] Resolution 60/288.

terrorist fighters; and national and regional counter-terrorism strategies) and has contributed substantively to a number of research and policy projects emanating from the working groups.[3] With a strong and supportive relationship with the Office of Counter-Terrorism, the Special Rapporteur is one of the signatories to the Global Counter-Terrorism Coordination Compact, and was fully engaged with the Office in its drafting and agreement.[4] The Special Rapporteur also participated in the High-level Conference of Heads of Counter-Terrorism Agencies of Member States convened by the Secretary-General in June 2018, and addressed the gathering on the importance of integrating human rights into the coordination of intelligence gathering and intelligence sharing activities.

6. The Special Rapporteur has engaged extensively in the activities of non-governmental organizations, human rights defenders and civil society organizations throughout the past year. Meetings have been held, inter alia, at Chatham House (London), the Center for Strategic and International Studies (Washington, D.C.) and the Palais des Nations (Geneva), and extensive civil society consultations have taken place during country visits to Belgium and France. The Special Rapporteur highlights ongoing work with non-governmental organizations to ensure greater access to and transparency from the United Nations counter-terrorism architecture for such organizations and human rights defenders. The Special Rapporteur emphasizes her commitment to integrating gender by including organizations working on issues related to women's rights into counter-terrorism focused meetings held under the auspices of her mandate.

7. The Special Rapporteur has contributed to a number of national debates concerning national security/terrorism legislation by offering expert views on draft legislation, including in Australia, in February 2018, and in the United Kingdom of Great Britain and Northern Ireland, in July 2018. The Special Rapporteur has issued multiple communications concerning the use of national security/terrorism legislation against civil society activists in multiple countries. She warns about the ongoing misuse of counter-terrorism law and administrative practice to quell legitimate dissent and limit freedom of expression. The Special Rapporteur has had ongoing and constructive engagement with the Financial Action Task Force, the Office of the European Union Counter-Terrorism Coordinator and the United Nations Counter-Terrorism Executive Directorate.

III. Charter of the United Nations and the role of the Security Council in regulating terrorism

8. The legal regulation of terrorism has posed significant challenges to the global legal order for many decades. States have responded at the domestic, regional and international levels through multiple legal and political avenues.[5] The Security Council has been reasonably active on counter-terrorism issues, but, historically, relevant resolutions were specifically linked to particular situations,[6] with one

[3] See Office of Counter-Terrorism, Counter-Terrorism Committee Executive Directorate and International Criminal Police Organization, *The Protection of Critical Infrastructure against Terrorist Attacks: Compendium of Good Practices* (2018).

[4] See www.un.org/en/counterterrorism/hlc/un-global-compact.shtmlA/72/840, annex III.

[5] Oversight of such activities is undertaken, inter alia, by human rights courts: see, for example, Ana Salinas de Frias, *Counter-Terrorism and Human Rights in the Case Law of the European Court of Human Rights* (Council of Europe Publishing, 2013).

[6] See, for example, Security Council resolutions 748 (1992) on Libya (1992), 1054 (1996) and 1070 (1996) on the Sudan and 1267 (1999) on Afghanistan.

exception.[7] Notably, prior to 11 September 2001, there were no resolutions adopted under Chapter VII of the Charter of the United Nations that imposed a legal duty on States to introduce specific kinds of domestic counter-terrorism legislation.

9. Internationally, multilateral regulation of terrorism until the attacks of 11 September 2001 was primarily carried out through treaties. These suppression treaties, which focused on responding to certain threats or actions, ranged from agreements that were sweeping in scope to those with more specific aims. These treaties illustrate the capacity of States to adopt a quasi-legislative model in response to terrorism, with the multilateral engagement of multiple States. Some of the earliest agreements include: (a) the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) of 1963;[8] (b) the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) (1970);[9] (c) the International Convention on the Taking of Hostages (Hostages Convention) of 1979;[10] (d) the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971;[11] and (e) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973.[12] These treaties constitute an important reservoir of multilateral agreement on the scope of terrorist acts, and the specific agreed obligations of States to act. Until the present time, agreement on the draft comprehensive convention on international terrorism, including the definition of terrorism contained therein, has been elusive,[13] with the Sixth Committee of the General Assembly remaining constrained by a lack of State consensus. The lack of agreement in the Sixth Committee should not, however, be understood as evidence of no agreement between States regarding the scope of their obligations and capacities in regulating terrorism. The lack of one broad treaty should not distract from the substantial agreement among States and the breadth and scope of legal regulation. Critically, negotiations on an expansive multilateral terrorism treaty have enabled agreement on specific aspects of global counter-terrorism regulation in important but largely underacknowledged ways.

10. While treaty-making was dominant in the regulation of terrorism before 11 September 2001, and remains important today,[14] it has, in the Special Rapporteur's view, been overtaken by the assertive role taken by the Security Council in regulating State responses to terrorism through the adoption of resolutions.[15] This shift in regulatory approach is complemented by the increased role of some regional regulatory processes,[16] in tandem with the establishment of specialized regulatory entities to address specific aspects of State practice as it intersects with counter-

[7] Unusually, Security Council resolution 1269 (1999), para. 1, does not refer to a situation in any particular country, but rather "Unequivocally condemns all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security".

[8] United Nations, *Treaty Series*, vol. 704, No. 10106.

[9] United Nations, *Treaty Series*, vol. 860, No. 12325.

[10] Resolution 34/146, annex.

[11] United Nations, *Treaty Series*, vol. 974, No. 14118.

[12] United Nations, *Treaty Series*, vol. 1035, No. 15410.

[13] Danja Blöcher, "Terrorism as an international crime: the definitional problem", *Eyes on the ICC*, vol. 8, No. 1 (2011), pp. 107 and 113.

[14] For example, Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft, 2014.

[15] Paul C. Szasz, "The Security Council starts legislating", *American Journal of International Law*, vol. 96, No. 4 (October 2002), p. 901.

[16] For example, see Council of Europe Convention on the Prevention of Terrorism, adopted in 2005, and its Additional Protocol, adopted in 2015; European Union Directive 2017/541 of the European Parliament and the Council of March 2017 on combating terrorism, replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

terrorism.[17] These combined shifts have had, in the opinion of the Special Rapporteur, a distinctly negative effect on the overall advancement of meaningful protection for human rights within the counter-terrorism sphere. Moreover, the Special Rapporteur articulates her grave concern that the well-entrenched constitutional and domestic protections for human rights embedded in national legal systems in many countries are being rendered irrelevant or powerless in the new regulatory landscape. Taking a macro view of Security Council resolutions, it appears that they have broadly urged, and sometimes required, States to implement sanctions regimes and counter-terrorism measures (this matter is discussed in greater depth in section IV.B below). It is the scope and the effect of those regimes and measures that is of concern in the present report, and it is with the process and procedures of this shift, and its effect on human rights protections, that the report is engaged. The report affirms the value of multilateral and reciprocal State engagement in regulating terrorism while concurrently ensuring the effective protection of human rights.

11. The Special Rapporteur recalls that in Article 24 (1), the Charter ascribes to the Security Council the "primary responsibility for the maintenance of international peace and security", and it is granted an impressive array of powers under Chapters VI and VII of the Charter.[18] In parallel, under Article 10, the General Assembly has express competence to make recommendations to the Council and Member States on "any questions or any matters" within the scope of the Charter", affirming its separate competence in peace and security matters. The Charter also expressly recognizes human rights as foundational to its purposes and principles. Article 1 of the Charter, setting out the purposes of the United Nations, affirms the promotion and encouragement of "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". This affirmation is specifically defined in Article 55 of the Charter, which connects conditions of stability and well-being enabling peaceful and friendly relations among nations "based on respect for the principle of equal rights and self-determination of peoples", to "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, language, or religion" (Article 55 (c)). The Special Rapporteur notes that such principles of respect and observance of human rights are not merely outward-facing obligations but also inward-facing: they guide the actions of all of the institutions and entities created and regulated by the Charter in the discharge of their powers; and the actions of all United Nations institutions and entities are equally grounded in the requirement to respect and promote human rights in all their actions, complemented by the obligations of customary international law to respect and promote certain fundamental human rights, as founded in the international legal personality of the United Nations.

IV. Role of the Security Council in the period after 11 September 2001

12. Contextualizing the role and practice of the Security Council after the events of 11 September 2001 requires a brief reflection on the expansion of the Council's role in the aftermath of the Cold War, when a reinvigorated Council regulated forcefully across a broader array of war and peace arenas. A notable change was the Council's practical enlargement of the concept of what posed a "threat to international peace and security". This move, prompted by new challenges to global peace and security, included situations that would have traditionally fallen outside of the understanding

[17] See, for example, www.fatf-gafi.org (Financial Action Task Force) and www.thegctf.org (Global Counter-Terrorism Forum).

[18] Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Leiden, Belgium, Martinus Nijhoff Publishers, 2009).

of the scope of collective action under the Charter.[19] This included situations of non-international armed conflict, gross violations of human rights amounting to crimes against humanity, humanitarian crises, coups d'état and other serious threats to the democratic order of a State. In obvious ways, the broadening of "threats to peace and security" laid the groundwork for the expansion of such threats to include global, regional and national experiences of terrorism. In the decade leading up to the events of 11 September, the Security Council further broadened its role by focusing on issues that pointed beyond any particular conflict or situation,[20] addressing, inter alia, the protection of children (resolutions 1261 (1999), 1265 (1999), 1296 (2000) and 1314 (2000)) and civilians (resolutions 1265 (1999) and 1296 (1999)) in situations of armed conflict, the role of women in the context of peace and security (resolution 1325 (2000)), flows of small arms and light weapons to Africa (resolution 1209 (1998)), HIV/AIDS (resolution 1308 (2000)), as well as international terrorism (resolution 1269 (1999)). However, the Special Rapporteur underscores that, notwithstanding commonalities with the post-Cold War expansion of the competence of the Council, the regulation of terrorism by the Council has unique and specific dimensions. These elements also pose significant challenges to the meaningful protection and promotion of human rights while countering terrorism.

13. Since the tragic and devastating events of 11 September 2001, the Security Council has issued sweeping and important statements of principle on the prevention of terrorism: they are clear, at least in their rhetorical sense, and undeniably enhance the duty of States to prevent and repress terrorism. These developments align with an increasingly important law-making function being carried out by international organizations more broadly, but in particular by the Security Council in the context of counter-terrorism. The Special Rapporteur cautions that such broad law-making has the capacity to impinge on the legitimate sovereignty of States, may override national constitutional and legislative protections for human rights and may operate to exclude broad and sustained debate among States, citizens and civil society concerning ways to safeguard human rights and security in the context of terrorism. The resolutions adopted by the Council are characterized by a number of common elements, including: significant speed in the drafting, debate and agreement of resolutions; a lack of engagement with civil society actors in the determination of legal, political, social and cultural effects of such resolutions; a lack of benchmarking of, or accountability for, human rights and humanitarian law violations that may follow from implementation; and lack of attention to the disproportionately detrimental enjoyment of specific human rights triggered by targeted forms of terrorism regulation. Finally, as noted in the previous report of the Special Rapporteur (A/72/495), because the resolutions lacked an agreed and comprehensive definition of terrorism consistently applied across all regulatory measures, States and regional organizations have been left free to craft their own definitions in implementation, resulting in a wide variety of groups, persons and activities being targeted by counter-terrorism regulation.

A. Security Council resolution 1373 (2001)

14. Primary among the resolutions adopted in the wake of the events of 11 September 2001 is resolution 1373 (2001). Many commentators have inferred that

[19] One early example is Security Council resolution 688 (1991), in which the Council stated that the consequence of "the repression of the Iraqi civilian population [...] threaten international peace and security in the region".

[20] Susan Lamb, "Legal limits to United Nations Security Council powers", in Guy S. Goodwin-Gill and Stefan Talmon, eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press, 1999), p. 361.

the resolution enhanced the counter-terrorism obligations of Member States, which, before the adoption of that resolution, rested upon a "low threshold [of] due-diligence".[21] When examining action by the Council following the events of September 2001, two stages become evident. Immediately after the attacks, the Council passed resolutions 1368 (2001) and 1373 (2001) and expanded the targeted sanctions regime set up under resolution 1267 (1999). Subsequent resolutions in the area of counter-terrorism, including resolution 1390 (2001), built on these two thematic legs until the rise of the Islamic State in Iraq and the Levant (ISIL) caused the Council to pass an extensive set of new measures, in its resolutions 2170 (2014), 2178 (2014) and 2396 (2017), which were deemed necessary for addressing the threat posed by ISIL and the "foreign fighters" phenomenon. This second phase of legislative action by the Council is ongoing, with the Council having passed a record number of thematically diverse terrorism-related resolutions in 2017 (including resolutions 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017) and 2395 (2017)).

15. Security Council resolution 1368 (2001), adopted on 12 September 2001, condemned the terrorist attacks of 11 September and called upon the members of the international community to "redouble their efforts" to prevent and suppress terrorist acts. On 28 September, the Council adopted resolution 1373 (2001), under Chapter VII of the Charter. Resolution 1373 (2001), one of the most wide-ranging resolutions ever passed by the Council, with an enormous weight of international political consensus behind it, placed mandatory obligations upon States.[22] As noted by a prominent scholar, the resolution manifested unusual legislative character as it mandated compulsory action of a general nature for States, with binding intent. Furthermore, while its adoption was triggered by the attacks of 11 September, the action mandated was not limited to a specific situation or conflict affecting international peace and security, nor did it include any explicit or implicit time limitation.[23] The resolution has been heralded as a historic event,[24] through which the Council took the "unprecedented step"[25] of enacting "legislation for the rest of the international community".[26]

16. Security Council resolution 1373 (2001) required States, among other things, to criminalize terrorist activities, to freeze the financial assets of terrorists and those participating in or facilitating terrorist acts, to ban others from making funds available to terrorists and to deny safe haven to such persons or groups. In the resolution, the Council decided that States should bring terrorists to justice, assist each other with respect to criminal prosecutions of terrorist offenders, institute effective border security measures and exchange information related to movements of terrorist persons or networks and forged or falsified travel documents. The resolution also drew attention to the link between international terrorism and "transnational organized crime, illicit drugs, money-laundering, illegal arms trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials" and stressed the need for international coordination in addressing that challenge. Uniquely, the

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[21] See James Thuo Gathii, *War, Commerce, and International Law* (Oxford University Press, 2010), p. 235.

[22] Wondwossen D. Kassa, "Rethinking the no definition consensus and the would have been binding assumption pertaining to Security Council resolution 1373 (2001)", *Flinders Law Journal*, vol. 17, No. 1 (2015), pp. 127 and 128.

[23] Paul C. Szasz, "The Security Council starts legislating", *American Journal of International Law*, vol. 96, No. 4 (October 2002), pp. 901 and 902.

[24] See S/PV.4413 (12 November 2001), intervention by the representative of the United Kingdom of Great Britain and Northern Ireland.

[25] See S/PV.4950 (22 April 2004), in which the representative of Angola declared that by "adopting resolution 1373 (2001), the Security Council took the unprecedented step of bringing into force legislation binding on all States on the issue of combating terrorism".

[26] See A/56/PV.25 (15 October 2001), intervention by the representative of Costa Rica.

resolution established a new mechanism in the form of the Counter-Terrorism Committee to monitor the implementation of the resolution by Member States. The language used by the Council ("decides that all States shall") indicated that various provisions contained mandatory directions in a style characteristic of legislation, as also confirmed in subsequent resolutions referring to "obligations" established under resolution 1373 (2001) (see Council resolutions 1611 (2005), 1618 (2005), 2133 (2014) and 2178 (2014).

17. Security Council resolution 1373 (2001) and follow-up resolutions placed particular emphasis on suppressing the sources of finance and support for terrorism. Resolution 1373 (2001) imposed binding obligations on States to prohibit and criminalize terrorist financing, prevent and suppress such acts and freeze the funds and assets of those committing or supporting terrorism. These obligations are based on provisions of the International Convention for the Suppression of the Financing of Terrorism.[27] With the Convention adopted in 1999 but not yet in force in September 2001, the Council made certain of its substantive provisions binding on all Member States under Chapter VII of the Charter. Although the Convention was adopted by the General Assembly without a vote, the Council's action nonetheless effectively bypassed domestic processes of ratification of international legal instruments, at least with respect of the provisions reflected in resolution 1373 (2001). It is also notable that the Council chose not to explicitly adopt the definition of terrorist acts from the Convention.

18. The Security Council has reaffirmed these obligations contained in resolution 1373 (2001) and has made further recommendations in subsequent resolutions. Notably, it addressed the issue of "justification or glorification (apology)" and "incitement of terrorist acts motivated by extremism and intolerance" in resolution 1624 (2005), calling upon all States to prohibit incitement to commit a terrorist act and prevent such conduct. Once again, the Council did not provide a definition of relevant terms. The Special Rapporteur notes that the 2005 resolution stressed, for the first time in an operative paragraph, that States "must comply" with their obligations under international law, in particular international human rights law, refugee law and humanitarian law. Specific reference is made to articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Special Rapporteur points out the obvious and lengthy time gap between 2001 and 2005 in the articulation of specific human rights obligations in counter-terrorism regulation by the Council, and she once again recalls the Charter and the human rights provisions contained therein, as well as their inward and outward facing dimensions.

B. Sanctions resolutions by the Security Council

19. In parallel to the thematic scope of resolution 1373 (2001), in the aftermath of the terrorist attacks of 11 September 2001, the Security Council, in its resolution 1390 (2002), and in subsequent resolutions, bolstered the sanctions regime set up under resolution 1267 (1999) targeting the Taliban leadership in Afghanistan and reframed sanctions as a global, open-ended regime focused on any "individual, group, undertaking, or entity associated with Al-Qaida, Usama bin Laden or the Taliban" not linked to a particular situation or conflict. Council resolution 1617 (2005), enacted under Chapter VII of the Charter, decided "that acts or activities indicating that an individual group, undertaking, or entity is 'associated with' Al-Qaida, Usama bin Laden or the Taliban include participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name

[27] Resolution 54/109, annex.

of, on behalf of, or in support of; supplying, selling or transferring arms and related materiel to; recruiting for; or otherwise supporting acts or activities of; Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof". The addition of "otherwise supporting acts or activities of" broadened the notion, opening the door to expansive definitions of [material] support to terrorism and terrorist acts under domestic law that have at times led to sanctioning or even criminalizing the activities of civil society organizations, humanitarian actors or criminalizing private or family relationships.[28]

20. The sanctions regime has been criticized for infringing upon a series of human rights, including the right to due process and effective remedy, its lack of transparency and lack of safeguards against arbitrary application (see A/65/268 and A/HRC/34/61). While improvements, including the inclusion of humanitarian exemptions, the publication of listing guidelines and narrative summaries of listing rationales, national court reviews, as well as the creation of the Office of the Ombudsperson (as limited to the Da'esh and Al-Qaida list), have mitigated some of these shortcomings, concerns remain. As my predecessor warned, the process remains "unnecessarily opaque" and access to information problematic (A/HRC/34/61, paras. 17–20), including for the Ombudsperson. The previous Ombudsperson expressed concerns about the insufficient transparency in the process and inadequate institutional guarantees of independence granted to the Ombudsperson's office.[29]

21. The Special Rapporteur notes the difficult and lengthy process it took to ameliorate the adverse human rights implications of the sanctions regime, which was set up without prior due consideration of its effects on a broad range of human rights and without any meaningful assessment of the impact, ex post facto, on human rights. The Special Rapporteur observes that sanctions resolutions have far fewer direct references to human rights and humanitarian law obligations than other counter-terrorism resolutions, a matter that is not merely cosmetic but points to an important regulatory difference and contextualization in the case of these resolutions. In the Special Rapporteur's view this distinction is not justified.

C. Security Council process and counter-terrorism resolutions

22. The Special Rapporteur is distinctly aware that the Security Council does not operate at arm's length from situations threatening peace and security. As the events of 11 September 2001 demonstrated, States and the international community must, at times, mobilize quickly and effectively to combat new threats and address regulatory lacunae that threaten global security. However, Council procedure has, in other contexts, functioned to give broad and meaningful capacity for State engagement, as well as consultation with various actors, including representatives of civil society and experts, to determine and review the likely consequences of the Council's exhortations and requirements.[30] Council resolutions on counter-terrorism measured over a 17-year period manifest a distinct pattern of fast-tracked creation, and a notable absence of broad consultation and engagement. This is compounded by the almost

[28] See Duke Law International Human Rights Clinic and Women Peacemakers Program, *Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security* (2017). Security Council resolution 1373 (2001) has led to States preparing their own terrorist lists. This auto-interpretive approach is arguably more detrimental to human rights than the specific lists adopted by the Security Council because such processes lack collective mediation and discussion.

[29] See www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/20151123openbriefing_1.pdf.

[30] Loraine Sievers and Sam Dawes, *The Procedure of the UN Security Council*, 4th ed. (Oxford University Press, 2014).

complete exclusion of civil society actors from the global counter-terrorism architecture at the United Nations.[31]

23. The Special Rapporteur highlights that this expedited policy process has significant implications for public scrutiny, debate and input from relevant actors, including Member States that are not members of the Security Council and civil society organizations. As highlighted herein, Council resolutions such as 2178 (2014), many of whose provisions are overbroad and vague, including terms such as "terrorist act" that are unconnected to any specific definition or description of prohibited conduct, may create broadly defined criminal offences that fail to satisfy the principle of legality. Breaches of the proportionality principle are also implicated by broadly defined criminal offences. Moreover, recent Council resolutions have moved squarely to express criminal law regulation, with often tenuous links between ancillary and inchoate offences and principal offences associated with acts of terrorism. This move has momentous consequences for the regulation of conduct, and expressly infringes on the due process rights of persons in countries implementing Council resolutions as mandated by the Charter. The Special Rapporteur notes that meaningful consultation with criminal law and human rights experts across different legal systems, including experts within the United Nations system, at the drafting and negotiation stage would reveal and potentially ameliorate these regulatory consequences. At present, the speed and closed nature of the drafting process for counter-terrorism resolutions make such inputs unlikely.

D. Security Council resolutions and foreign fighters

24. The activities of ISIL and other armed groups in Iraq and the Syrian Arab Republic and the flow of foreign fighters to the region led to the adoption of Security Council resolution 2170 (2014), swiftly followed by the adoption of resolution 2178 (2014). While both resolutions were adopted under Chapter VII of the Charter, resolution 2178 (2014) specifically builds on the model set by resolution 1373 (2001), establishing a set of far-reaching legislative obligations on all Member States.

25. The Security Council, in its resolution 2178 (2014), defined "foreign terrorist fighters" as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict". Under the resolution, States were required to suppress and prevent the recruitment, organization, transport and equipment of such foreign terrorist fighters, including by preventing their departure, entry and transit. The Special Rapporteur is of the view that such obligations need to be carried out in line with international human rights law, refugee law and international humanitarian law. The resolution also required States to enact the necessary legislation to prosecute persons who travel or attempt to travel to another State to perpetrate, plan, prepare or participate in terrorist acts or to provide or receive terrorist training, including persons who finance, organize the travel of or recruit "foreign terrorist fighters". The resolution did not specify how such compliance with international law would be assessed, nor was any specific guidance given to States in the resolution, which provides concrete specifics in other aspects. Critically, there are numerous ongoing debates in this arena concerning the application of international humanitarian law; how the material fields of application for article 3 common to the Four Geneva Conventions and Additional Protocol II intersect in real time and

[31] Stephanie David and Bailey Theado, *The United Nations Counter-Terrorism Complex: Bureaucracy, Political Influence and Civil Liberties* (International Federation for Human Rights, 2017).

territorial space with definitions contained in Council resolutions; and how the resolutions might affect the still relevant legal norm of self-determination.

26. In addition to the above, the Security Council called on States to take measures aimed at countering violent extremism, which can be conducive to terrorism, including by preventing radicalization, recruitment and mobilization, and to engage relevant local communities and non-governmental actors. States were further required to cooperate when addressing the threat posed by the foreign fighters phenomenon, in accordance with their obligations under international law, to enhance the effectiveness of mutual legal assistance agreements in criminal matters[32] and to intensify and accelerate the exchange of operational information to prevent the entry into or transit through their territories of persons believed to be foreign terrorist fighters.[33] The Council also called upon States to require that airlines operating in their territories provide advance passenger information to the appropriate national authorities, to improve international, regional and subregional cooperation to facilitate the uncovering of patterns of travel by foreign terrorist fighters and to prevent terrorists from exploiting technology. The human rights consequences of such regulatory requirements are immense, impinging on the non-refoulement principle, freedom of movement, expression and the right to private and family life.

27. The obligation to share information has been extended to cover not only those who qualify as foreign terrorist fighters in accordance with resolution 2178 (2014) but also, under resolution 2396 (2017), their families "travelling back to their countries of origin or nationality, or to third countries, from conflict zones". The Security Council's focus on family members represents a significant normative and procedural move, even more so in the light of the Council's demonstrated interest in regulating the "pre-criminal space". The array of actors implicated in these resolutions creates a ripple effect in human rights terms, whereby the repercussions in terms of human rights concern a much larger group than the subject matter of the resolutions might suggest, with a disproportionate effect on vulnerable and disadvantaged groups, particularly women and children.

28. Building on the previous body of recommendations and binding measures, Security Council resolution 2396 (2017) called on States to strengthen efforts in ways that may have further serious implications for domestic legal regimes, including by turning recommendations contained in previous resolutions into binding obligations under Chapter VII of the Charter. These domestic legal effects directly implicate the human rights obligations of States and may, de facto, neutralize the capacity of domestic human rights norms and institutions to operate effectively in protecting citizens and non-citizens alike.

29. Security Council resolution 2396 (2017) required States to establish advance passenger information systems "in order to detect the departure from their territories, or attempted travel to, entry into or transit through their territories, by means of civil aircraft, of foreign terrorist fighters" and other designated individuals, and to collect, process and analyse passenger name record data. Member States were encouraged to share such information to be used by all relevant national authorities, "with full respect for human rights and fundamental freedoms for the purpose of preventing, detecting and investigating terrorist offenses and related travel".

30. In the same resolution, the Security Council also imposed an obligation to develop "watch lists or databases of known and suspected terrorists, including foreign

[32] Security Council resolution 2396 (2017), para. 24, recommends that "in the absence of applicable conventions or provisions" States "cooperate when possible on the basis of reciprocity or on a case by case basis".

[33] See Security Council resolutions 2178 (2014), para. 9, 2322 (2016) and 2396 (2017), paras. 3 and 22.

terrorist fighters, for use by law enforcement, border security, customs, military, and intelligence agencies to screen travellers and conduct risk assessments and investigations" and to "develop and implement systems to collect biometric data, which could include fingerprints, photographs, facial recognition, and other relevant identifying biometric data, in order to responsibly and properly identify terrorists, including foreign terrorist fighters". Relevant obligations are to be formally implemented in compliance with international human rights law. The Special Rapporteur is deeply concerned that doing so, in practice, may be arduous, given the lack of specific guidance on protecting the specific human rights involved. Moreover, it remains entirely unclear which mechanisms are to be used to resolve conflicts between instruments and processes protecting human rights domestically and Council regulation. In these debates, regrettably, the exhortation to compliance and the perceived costs of non-compliance may far outweigh the compulsion to provide human rights protection.

31. While Security Council resolutions 2178 (2014) and 2396 (2017) appear to follow the same model for mandating compulsory action of a general nature as resolution 1373 (2001), close analysis shows that we are dealing with even more far-reaching instruments. While resolution 1373 (2001) criminalized conduct that had already been included in a convention negotiated under the aegis of the General Assembly and adopted without a vote, conversely, the conduct criminalized in accordance with paragraph 6 (a) of resolution 2178 (2014) was not reflected in any instrument negotiated in the context of a multilateral process. Hence, other than in that resolution, States had no basis in international law to criminalize travelling abroad with a "terrorist" intent. Similarly, States had no previous obligation under international law to set up watch lists, develop biometric databases and advance passenger information systems, or to develop passenger name record capacity, as required by resolution 2396 (2017). The resulting challenges in implementing resolution 2178 (2014) in a manner compliant with international human rights obligations have been addressed by numerous stakeholders, including by the previous Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism[34] and the Office of the United Nations High Commissioner for Human Rights (OHCHR).[35] Comparable granularity in analysis will also be needed in relation to the extensive obligations established more recently by the Council in its resolution 2396 (2017), but preliminary analysis suggests a pervasive degrading of human rights protection as well as process concerns for transposition of these obligations domestically.

32. It is not clear if any rights-related proportionality analysis was undertaken with respect to Security Council resolution 2178 (2014). There was no engagement with civil society about the rights-related impact of the resolution. Some of the human rights gaps evidenced in the resolution have been admirably filled by the working group on the rule of law and human rights established by the Counter-Terrorism Implementation Task Force, under the leadership of OHCHR, which has provided specific and concrete direction to States on how human rights may be negatively impacted by measures taken, and how such measures can be implemented in a human rights-compliant manner.[36] I express strong concern that the scope and breath of the resolution constitutes a broad encroachment on the regulation of criminal law broadly

[34] See A/HRC/29/51.

[35] See A/HRC/28/28.

[36] Office of the United Nations High Commissioner for Human Rights, *Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters* (New York, United Nations, 2018), available at: www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf.

defined, without corresponding protection for rights and liberties, as would be the norm if the same kind of legislation emanated within many national legal systems.

E. Human rights protection and counter-terrorism resolutions

33. The expansion of institutional and legal counter-terrorism frameworks, policies and practices following the events of 11 September 2001 has been formidable.[37] Through its resolutions adopted after that date, particularly resolutions 1373 (2001), 2178 (2014) and 2396 (2017), the Security Council ensured that the obligation to prevent terrorism, coupled with other important ancillary duties, are now incumbent upon all States. Moreover, in a revolutionary stroke of the pen, the Council did not fix any geographical limits or prescribe any specific time frame as regards the imposition of these norms in resolution 1373 (2001).[38] More recently, resolution 2178 (2014), adopted under Chapter VII of the Charter, has been described as "one of the most important quasi-legislative efforts of the Council since resolution 1373 (2001)".

34. The Special Rapporteur emphasizes the fundamental challenges to human rights promotion and protection that follow from a lack of agreed and precise definition of terrorism applied across all counter-terrorism resolutions. This definitional gap has persisted to the present. Some attempts at clarity have been undertaken, but they are insufficient to address the human rights gaps and violations implicated. For example, in its resolution 1566 (2004), the Security Council adopted a definition of terrorist acts.[39] However, the Special Rapporteur considers that the early absence of a definition enabled the development of a doctrine of deference to State counter-terrorism practices in the formative period of action by the Council on counter-terrorism. She notes, in particular, that the terminology provided in resolution 1566 (2004) seems to have been interpreted by States as de minimis threshold, allowing for the adoption of broad domestic definitions in many jurisdictions. Such definitions may in turn lead to a broadening of the applicability of measures mandated under Council resolutions beyond what can legitimately be characterized as a threat to international peace and security and thus beyond what the Council intended. This also puts in question the legality of measures taken pursuant to expansive definitions, particularly when relevant measures limit human rights. By broadening the categories of conduct and groups or persons that such measures are applicable to, they risk becoming disjointed from the original legitimating purpose contained in the resolutions adopted by the Council.

35. The measures contemplated by the Security Council in its resolution 1373 (2001) had far reaching implications for the protection of human rights, but the resolution made no comprehensive or even specific reference to the need for States

[37] An extensive structure was created to support these norms. The Counter-Terrorism Committee was established by Security Council resolution 1373 (2001) and bolstered by resolution 1624 (2005). The implementation capacity of the Committee was enabled by the Counter-Terrorism Committee Executive Directorate. Sequentially, the Counter-Terrorism Implementation Task Force was established by the Secretary-General in 2005 and endorsed by the General Assembly through the United Nations Global Counter Terrorism Strategy, adopted in 2006. The Task Force organizes its work through working groups and counter-terrorism related projects. The Office of Counter-Terrorism was established by the General Assembly in its resolution 71/291.

[38] Vincent-Joël Proulx, "An incomplete revolution: enhancing the Security Council's role in enforcing counter-terrorism obligations", *Journal of International Dispute Settlement*, vol. 8, No. 2 (May 2017), p. 303.

[39] Security Council resolution 1566 (2004), para. 3: the Special Rapporteur underscores that the language in paragraph 5 of the resolution suggests that the definition was not intended to replace one adopted through a comprehensive multilateral process.

to comply with human rights standards in the suppression of terrorism.[40] Instead, the preamble to the resolution affirms the need to combat terrorist acts "by all means, in accordance with the Charter of the United Nations". As the Charter makes substantial references to human rights protection, this would constitute an implicit reference to the need to promote and respect human rights norms. However, the obliqueness of this positive interpretation only serves to highlight the lack of an explicit statement in the resolution, and "leaves the impression that human rights protection is a secondary consideration in the campaign against terrorism, instead of an essential component of any counter-terrorism strategy".[41] Furthermore, the only explicit reference to human rights norms in the operative paragraphs of resolution 1373 (2001) arises in the context of refugees and asylum-seekers, where States are required to take appropriate measures to ensure that such persons have not been involved in the commission of terrorist acts.

36. In subsequent resolutions, the Security Council began to include language on the need for States to ensure that "any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."[42] More recently, Council resolutions have started to incorporate language according to which "effective counter-terrorism measures and respect for [...] the rule of law are complementary and mutually reinforcing" and that they are "an essential part of a successful counter-terrorism effort."[43] Furthermore, some resolutions have emphasized the need to address the conditions conducive to the spread of terrorism,[44] including, but not limited to, "(...) the need to promote the rule of law, the protection of human rights and fundamental freedoms ...".[45]

37. While references to international human rights law have multiplied, the actual impact of such generic language, without clear and explicit human rights guidance provided in the text, is questionable. Such concerns are particularly pertinent, recalling the extensive human rights implications of actions mandated by some of the Security Council resolutions. In the absence of a comprehensive assessment of human rights impact allowing for a meaningful integration of human rights considerations, language stressing the importance of compliance with human rights standards rings hollow and artificial.

38. The United Nations counter-terrorism architecture has been consistently critiqued for its lack of attention to the human rights implications of its counter-terrorism regulation. Despite increasing references to human rights treaties in recent Security Council resolutions, including resolutions 2396 (2017) and 2170 (2014), in practice human rights have been "minimized to a generic line in a resolution, reduced to a few questions on a country visit survey, comprised of a small staff sprinkled throughout the Secretariat and Security Council bodies, securitized in the preventing violent extremism agenda, and underfunded in its programming".[46] The early assault on human rights may be traced to the immediate aftermath of the events of 11 September 2001, including: the lack of any formal institutional counter-balance to support mainstreaming human rights oversight of country action, reporting and assessment through the Counter-Terrorism Committee and its Executive

[40] International Helsinki Federation for Human Rights, *Anti-Terrorism Measures, Security and Human Rights* (2003), pp. 41 and 42.

[41] Ibid., p. 42.

[42] See Security Council resolutions 1535 (2004), 1456 (2003), para. 6, and 1624 (2005), para. 4.

[43] See Security Council resolutions 2129 (2013), 2170 (2014), 2178 (2014), 2395 (2017) and 2396 (2017).

[44] See resolution 60/288, annex, sect. I.

[45] See Security Council resolutions 1963 (2010) and 2129 (2013).

[46] David and Theado, *The United Nations Counter-Terrorism Complex*, p. 7.

Directorate;[47] the lack of access in any meaningful and systematic way for civil society actors and human rights defenders to the counter-terrorism architecture; and the minimal capacity of existing human rights entities within the counter-terrorism architecture.[48] The Special Rapporteur affirms that the process and substance concerns with regard to human rights are pressing and substantial, and that they require meaningful engagement by the United Nations counter-terrorism architecture as a whole.

V. Promotion and protection of human rights while countering terrorism

39. Security is a human right, guaranteed in its most fundamental articulation in the Universal Declaration of Human Rights, which, under article 3, guarantees the right to life, liberty and security of person without distinction. This principle was translated into a universal norm in articles 6 and 9 of the International Covenant on Civil and Political Rights, to which 172 Member States are party. Security and human rights are not two practices or concepts at odds with one another. Rather, the two are fundamentally entwined and co-dependent. Security without human rights protections is an illusion, a colossus with clay feet. Rights without security is also a chimera, as having all rights theoretically means nothing in practice if people are not safe in their homes, streets, communities and countries.

40. The role of the Security Council in maintaining and protecting international peace and security is critical. Equally critical to security is the role of the Council in protecting the human rights of persons subject to its regulatory scope. As the regulatory capacity of Council action in the field of counter-terrorism has expanded, the scope of its obligations to protect and ensure respect for human rights has enlarged in parallel. The Special Rapporteur articulates profound concern that as counter-terrorism regulation expands it may do harm to the most essential human rights (freedom from torture, freedom of religion or belief, freedom of opinion and expression, freedom of peaceful assembly, freedom of association), and may have particular effects on historically disadvantaged groups, including women, laying the foundation for profound and unaccountable human rights violations and giving unfettered free rein to States to use Council resolutions as a defence mechanism for widespread human rights violations in the name of security. Itis time for the Council to engage in ensuring the totality of the Charter's purposes and to remain seized of its human rights obligations.

41. The vulnerability of human rights protections is evident through a close examination of domestic counter-terrorism practices. The Special Rapporteur and other mandate-holders are increasingly finding that multiple communications to their offices involve the use of counter-terrorism law and administrative practice against civil society and human rights defenders.[49] Human rights violations do not make the world safer or more secure, they undermine the security of all.

42. In her 2018 report to the Human Rights Council, the Special Rapporteur noted that a key principle of domestic procedures is that they satisfy and enable the principle

[47] The addition of human rights advisers at the Counter-Terrorism Executive Directorate is an improvement, but overall the organization does not adopt a human rights mainstreaming approach, has limited access to non-governmental organizations in consultation generally and specifically when it conducts in-country assessments, and human rights compliance is not a benchmarked element of assessment in state practice. See www.un.org/sc/ctc/focus-areas/human-rights/.

[48] See A/HRC/31/65; Commission on Human Rights Council resolution 2005/80.

[49] See https://spcommreports.ohchr.org.

of legality and proclamation within the State (particularly where legislative enactments may engage emergency or exceptional law), giving (ideally) ample and sufficient information to the public at large about the existence of exceptional regulation and the specific legal means being used to address the challenges faced by States (A/HRC/37/52, para. 18). In the same report, she also noted that counter-terrorism legislation (premised on the requirements of resolution 1373 (2001)) engages de facto emergency practice, and may in many cases trigger the necessity for derogation under international human rights treaty law obligations. A clear corollary of this assessment is that Security Council resolutions may themselves constitute a form of emergency power authorization, without engaging the safeguards that would normally follow at the domestic level from the instigation of emergency powers under most national legal systems. The absence of safety or review mechanisms on the exceptional implications of Council mandates constitutes fundamental lacunae in the existing regulatory pattern for global counter-terrorism regulation. These gaps have adverse implications for the protections of human rights, and on the integrity of the human rights treaty system as a whole. In practice, the operationalization of such protections for exceptional legal regulation falls entirely within the domestic arena, although domestic procedural protections may be insufficient when the trigger to regulation comes from the Council.

43. The Special Rapporteur points out that supranational legal regulation, including such devices as Security Council resolutions and European Union directives, can impinge on the prerogatives of national legal systems and undermine the procedural and rights-based protections entrenched in national law designed precisely to protect against overreach by emergency powers. The Special Rapporteur affirms that international practice by supranational bodies addressing terrorism must not impinge on the protection of rights contained within national constitutions and procedures, which must themselves be human rights-compliant. This caution needs to be borne in mind given the increasingly dense production of global regulation connected to counter-terrorism and violent extremism, which is often tone-deaf to domestic human rights protections and procedures amplifying and supporting rights. Moreover, the Special Rapporteur notes her concern about: the ways in which international obligations are used as a rationale for failing to conform to domestic legal requirements; new forms of counter-terrorism regulation that expressly work around or limit the full operation of domestic legal constraints, including supranational legal dictates that fail to pay attention to the legality requirements of national legal systems; and the use of ordinary law as a vehicle for substantive and far-reaching counter-terrorism regulation that circumvents the requirements of notification and proclamation. It should also be noted that Governments are regularly fast-tracking extensive counter-terrorism legislation, leaving little time for consideration of the impact on rights, obfuscating obligations to notify international treaty bodies of the measures and entrenching permanent securitization.

44. The Special Rapporteur explicitly pinpoints the link between the human rights gaps found in multiple Security Council resolutions and the human rights gaps that are evident at the national level. She makes that obvious point that, as affirmed in the United Nations Global Counter-Terrorism Strategy and in the increased attention to preventing and countering violent extremism within the United Nations system, serious human rights violations, allied with rule of law deficits are an integral part of the conditions conducive to terrorism.[50] The Council does not serve its own peace and security interests well if it ignores this fundamental connection and is not fully

[50] United Nations Development Programme, *Journey to Extremism in Africa: Drivers, Incentives and the Tipping Point for Recruitment* (2017), available at **Error! Hyperlink reference not valid.**.

cognizant of the relationship between repressive counter-terrorism measures and those very conditions.

45. The Special Rapporteur underscores the specific tensions inherent in criminal law regulation by international organs and institutions. These tensions have been well-recognized in regional contexts, and the establishment of rights-bearing norms within those systems (for example. the Charter of Fundamental Rights of the European Union), as well as active judicial oversight (for example the fundamental rights jurisprudence of the European Court of Justice) is testament to the necessity of mainstreaming rights in contexts where supranational legislative mechanisms impinge on individual and group rights.[51] These regional arrangements and the deep integration of rights into their operations underscores further the evident gaps in Security Council resolutions, and the distinct and unmistakable human rights gaps in the supranational counter-terrorism sphere. The Special Rapporteur notes that while the process of the universal periodic review, the oversight of treaty monitoring bodies and the role of independent mandate-holders are important human rights processes, intersecting with the downstream effects of counter-terrorism, they collectively operate with significant limitations in providing timely, enforceable and sustained oversight of the human rights violations that may follow from counter-terrorism regulation.

VI. Observance and enforcement of international humanitarian law

46. Counter-terrorism operations and measures are frequently undertaken in the context of armed conflict where international humanitarian law applies. This reality is illustrated by the number of non-international armed conflicts involving armed groups subject to United Nations terrorist designation and its targeted sanctions regime or included on regional and national terrorist sanctions lists. Against this background, the International Committee of the Red Cross and other stakeholders have warned that the lack of sufficient consideration regarding the interaction between international humanitarian law and the norms and standards relevant to countering terrorism was leading to a troubling conflation of the two.[52]

47. Whereas Security Council resolutions enacted in recent years stress the importance that State measures in response to terrorism be in line with obligations under international humanitarian law, [53] such generic mentions fall short of meaningfully addressing concerns about counter-terrorism measures undermining the multilaterally agreed protection of international humanitarian law. In this regard, the Special Rapporteur notes the tendency on the part of some States to equate any use of force by a non-State actor to terrorism, even if the respective conduct occurs in the context of an armed conflict as defined by international humanitarian law and is not in violation of the international norms governing such conflicts. It is reported that numerous jurisdictions resort to counter-terrorism legislation to criminalize acts that

[51] See for example, European Court of Human Rights, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Case Nos. C-402/05 P and C-415/05 P, Judgment of the Court, 3 September 2008; Fiona de Londras, "Accounting for rights in EU counter-terrorism: towards effective review", *Columbia Journal of European Law*, vol. 22, No. 2 (Spring 2016), p. 237.

[52] International Committee of the Red Cross (ICRC), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (32IC/15/11).

[53] See, for example, Security Council resolutions 1535 (2004), 1456 (2003), para. 6, and 1624 (2005), para. 4.

are either not prohibited or are protected under international humanitarian law.[54] The Special Rapporteur underscores the importance of a universally accepted definition of terrorism and terrorism-related offenses that duly considers the interplay of obligations under different bodies of law, with particular emphasis on the law governing armed conflicts.

48. Security Council-mandated measures addressing the foreign fighter phenomenon, in particular resolution 2178 (2014), have, arguably, further contributed to the blurring of the lines between terrorism and international humanitarian law. Resolution 2178 (2014) addresses persons who qualify as "foreign terrorist fighters" recruited by terrorist groups, including but not limited to entities listed in the context of the 1267 (1999) sanctions regime. While using the word "fighter", a term commonly employed to describe a person with a combat role belonging to an organized non-State armed group, party to a non-international armed conflict,[55] the scope of the resolution is not restricted to addressing such conflicts nor is the definition of a "foreign terrorist fighter" limited to persons taking direct part in hostilities as members of terrorist groups party to an armed conflict. By referring to these persons as "terrorist fighters", the resolution reinforces the problematic assumption that taking direct part in hostilities automatically amounts to a terrorist offense.[56] Furthermore, the unintended results may include an expanded application of international humanitarian law to situations that fall below the threshold of an armed conflict. Considering the lower protection level resulting from the application of the law of armed conflict, including the rules governing use of force and deprivation of liberty, the related human rights concerns are evident. The diverging domestic definitions of terrorism and terrorist groups may further exacerbate the above-described negative effects.

49. The presence of designated terrorist organizations may have a chilling effect on the activities of humanitarian organizations in armed conflict contexts. Sweeping definitions of "association with", "support" or "assistance" to terrorist organizations has been highlighted as potentially criminalizing a broad range of conduct, including that of organizations carrying out activities that are exclusively humanitarian and impartial in nature.[57] The Special Rapporteur notes that the General Assembly has repeatedly urged States, including in the recent review of the United Nations Global Counter-Terrorism Strategy, "to ensure, in accordance with their obligations under international law and national regulations, and whenever international humanitarian law is applicable, that counter-terrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as foreseen by international humanitarian law" (see resolutions 72/284, para. 79, and 70/148). Thus far the Security Council has not established a sector-wide humanitarian exemption in relevant counter-terrorism resolutions. While the regime established under Council resolution 1267 (1999), and further developed in a number of subsequent resolutions, including resolution 1452 (2002), provides for the possibility of limited "individual exemptions" for humanitarian action, resolution 1373 (2001) and subsequent resolutions do not provide an exemption. The Special Rapporteur warns of the unreflective adoption of measures lacking meaningful impact assessment

[54] Stéphane Ojeda, "Out of balance: global counter-terrorism and the laws of war", blog, Humanitarian Law and Policy, 15 September 2017.

[55] See https://casebook.icrc.org/glossary/fighters.

[56] For example, Sandra Krähenmann, "The obligations under international law of the foreign fighter's state of nationality or habitual residence, state of transit and state of destination", in Andrea de Guttry, Francesca Capone and Christophe Paulussen, eds., *Foreign Fighters Under International Law and Beyond* (The Hague, T.M.C. Asser Press, 2016), p. 240.

[57] See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (31IC/11/5.1.2); S/2016/827, para. 19.

and considers that humanitarian exemption clauses should be a consistent feature in relevant resolutions.

VII. Recommendations

50. **The Special Rapporteur makes the following recommendations to safeguard the critical regulatory role of the Security Council in addressing and regulating the peace and security implications of terrorism, complemented by an active and sustained commitment to the meaningful enforcement of human rights in the same sphere:**

(a) **States are encouraged to move beyond using the oft repeated mechanical phrase of commitment to observe human rights generically ("should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law") and to adopt specific and directive human rights obligations for States in legislative resolutions and to ensure that specific obligations to legislate in specific arenas are linked to the protection and promotion of specific enumerated rights implicated by particular measures: respect for human rights and the rule of law must be the bedrock of the global fight against terrorism, and beyond rhetoric this principle must be reflected in practice, procedure and institutional culture;**

(b) **The absence of a consistent definition of terrorism across Security Council resolutions cedes extraordinary latitude to States and supranational organizations to define terrorism broadly, vaguely and in ways that unduly limit the exercise of human rights at national levels: closing this gap is essential to prevent nefarious definitions of terrorism from proliferating at the domestic level, thus undoing and undermining the broader security interests of the international community as well as impacting negatively on the protection of human rights;**

(c) **States are encouraged to use precise and defined terminology when quasi-legislative requirements are being advanced by Security Council resolutions: terms such as "incitement" and "material support" must be given precise legal meaning, consistent with the principles of legality and proportionality as the absence of such precision creates conditions under which counter-terrorism norms can be abused domestically, undermining human rights protections for individuals and groups;**

(d) **Given the sensitivity of an expanded quasi-regulatory role for the Security Council, and the natural concerns of States regarding their sovereignty, the Special Rapporteur: (i) encourages broader consultation and transparency with Member States in respect of "legislative" resolutions: the Special Rapporteur notes that Council resolution 1373 (2001) was adopted within a time span of 48 hours; that there was no Security Council debate before the adoption of resolution 2178 (2014); and that there was tightly constrained consultation in respect of resolution 2396 (2017); a commitment to transparency would include open debate; and, in general and where possible, fast-track legislative processes by the Council implicating human rights should be avoided: (ii) in cases where such a process takes place, the Special Rapporteur encourages a meaningful commitment to human rights, which should include innovative procedural responses, for example an ex ante rights impact analysis; and (iii) when general, binding rules are being deliberated, all States should be considered as affected States in the sense of Article 31 of the Charter of the United Nations; greater and transparent consultation may prevent downstream legal jeopardy in the process of regional or national transposition, as well as addressing some of the**

implementation and coordination challenges that were faced in the implementation of resolution 1373 (2001);

(e) The Special Rapporteur encourages States to consider a form of a priori human rights review for Security Council resolutions in the counter-terrorism domain that have a quasi-legislative character and that mandate criminal law regulation at the domestic level: the procedural capacity of the Council to set its own terms of regulation is considerable; advancement on an internal procedural mechanism agreed among States to ensure that the object and purpose of the Charter is met would go a considerable way to satisfy legitimacy, legality and proportionality concerns that have been raised in respect of Council resolutions adopted after 11 September 2001;

(f) The Special Rapporteur affirms that the Security Council is the preeminent body best placed to set exemplary human rights compliance criteria as States advance their counter-terrorism goals; the Council is also best placed to model most effectively the duty of States to respect, promote and fulfil human rights; this is enabled through the operational capacity of the Counter-Terrorism Committee as supported by the Counter-Terrorism Executive Directorate, which are well-placed to assess whether States are in full and meaningful compliance with their human rights obligations in the implementation of multiple counter-terrorism resolutions; human rights compliance must be centralized in counter-terrorism compliance assessments based on rigorous criteria, drawing upon the standards and assessment tools developed by OHCHR, complemented by the expertise of human rights bodies, including the Human Rights Committee, and taking into account the country reporting of the Special Rapporteur of the Human Rights Council on the protection and promotion of human rights and fundamental freedoms while countering terrorism (also a member of the Counter-Terrorism Implementation Task Force), as well as the developing expertise of the Task Force's working group on promoting and protecting human rights and the rule of law while countering terrorism;

(g) The Special Rapporteur reminds States that human rights compliance under the principles and purposes of the Charter is not merely an externally facing obligation but is also internally facing: benchmarking and assessing the performance of the Security Council in advancing human rights should be a reflective practice, encouraged and supported by the multiple entities that constitute the United Nations counter-terrorism architecture;

(h) The Special Rapporteur reminds States that when extraordinary legislative measures are taken at the domestic level in respect of terrorism or other security challenges, they contain sunset clauses and/or mechanisms of periodic review of such provisions; these elements constitute explicit recognition of the exceptionality of regulation in the context of particular threats, acknowledging that such powers often only need to be used for finite periods, and that the scope and impact requires human rights benchmarking and oversight: it is notable that such procedural protections are entirely absent from Security Council resolutions that may possess the character of emergency powers in their own right; in this regard, the Special Rapporteur encourages States to reflect seriously on this gap, and to remedy it by adopting best practices (sunset clauses and review) at the national level to parallel regulation internationally;

(i) Recalling that all Member States are obliged to take joint and separate action in cooperation with the United Nations for the achievement of the purposes set out in Article 55 of the Charter, the Special Rapporteur encourages the General Assembly to remain seized of the opportunity and obligation to promote and ensure respect for human rights, particularly through deepening

the rule of law capacity of the Office of Counter-Terrorism, supporting the oversight and expertise of OHCHR and making the commitment to mainstream human rights, as affirmed in the fourth pillar of the United Nations Global Counter-Terrorism Strategy, honoured in practice.